question of fact upon which the guilt or innocence of the accused depends. It is as much a question of fact as the question of his physical presence at the act itself. The right to trial by jury must imply the right to have the jury pass upon every question of fact material to the decision. Otherwise a hostile legislature might withdraw from their consideration one issue after another until the whole institution became reduced to a hollow shell.[12] The complete abolition of the defence would make the question of insanity wholly irrelevant. It might then be tried as an independent matter by any proper authority. But under the doctrine of the principal case that is not due process of law, and matters must stand practically as they now are.

MURDER OF THE INSURED BY THE BENEFICIARY. — The maxim that no man can take advantage of his own wrong does not in itself afford a complete answer to a murderer's contention that his crime ought not to affect his property rights.[1] Where a husband or wife, having murdered the other, has sought to take under the unconditional terms of the statutes relating to descent, dower and devises, the earlier cases frankly read exceptions into these statutes.[2] But the later decisions have made no exception and allow the murderer to take the legal title free from equities;[3] for the suggestion that a constructive trust arises in favor of the next in line of inheritance has not been adopted by the courts.[4]

But when the murderer has claimed as beneficiary of an insurance contract no difficulty has been felt in flatly refusing assistance.[5] For it is well recognized that the interest of a beneficiary is essentially equitable; that he is the *cestui que trust* of the insured, who holds the obligation of the insurer in trust for him.[6] Statutes and decisions that allow the beneficiary to sue in his own name do not change the essential characteristics of this relationship.[7] And since the beneficiary cannot come into court with clean hands, he is not entitled to relief. A recent Ohio case has properly refused to allow a recovery by the beneficiary. *Filmore* v. *Metropolitan Life Insurance Co.*, 92 N. E. 26 (Oh.). But the reasoning of the court is not conclusive, for it places its decision upon the ground

[12] See BLACK, CONST. LAW, 2 ed., 519.

[1] Box *v.* Lanier, 2 Tenn. Ch. App. 1; Perry *v.* Strawbridge, 209 Mo. 621.

[2] Shellenberger *v.* Ransom, 47 N. W. 700 (Neb.); Riggs *v.* Palmer, 115 N. Y. 506 (devise). See 4 HARV. L. REV. 394; Perry *v.* Strawbridge, *supra* (a murderer of his wife is not a "widower" within the statute).

[3] Wellner *v.* Eckstein, 101 Minn. 444 (statutory dower); *In re* Carpenter's Estate, 170 Pa. St. 203; Owens *v.* Owens, 100 N. C. 240 (statutory dower — statute subsequently amended); Shellenberger *v.* Ransom, 59 N. W. 935 (Neb.); McAllister *v.* Fair, 72 Kan. 533; Kuhn *v.* Kuhn, 125 Ia. 449; Gollnik *v.* Mengel, 128 N. W. 292 (Minn.).

[4] Dean Ames advanced this view in 8 HARV. L. REV. 170. In Kuhn *v.* Kuhn, *supra*, it was passed upon by the court and rejected. A constructive trust arises only in favor of one who has suffered, the next in line of inheritance is seeking only a windfall.

[5] Schmidt *v.* Northern Life Association, 112 Ia. 41; New York Life Insurance Co. *v.* Davis, 96 Va. 737; Schreiner *v.* High Court C. O. of F., 35 Ill. App. 576.

[6] Cleaver *v.* Mutual Reserve Fund Ass., [1892] 1 Q. B. 147. This is the leading English case on this subject.

[7] The cases in which the contract is made directly between the insurer and the beneficiary upon the life of a third person are obviously not here considered.

that no loss has occurred under the terms of the policy, and quotes the words of Field, J., "As well might he recover insurance money upon a building that he had intentionally fired." [8] The analogy to fire insurance is unfortunate. The nature of life insurance is fundamentally different. In the former the payment is made only as an indemnity and upon the happening of an "accident." In the latter the contract is essentially an investment, a purchase by the insurance company of an annuity upon the life of the insured. The insurer contemplates a loss upon every policy, as is shown by its willingness to advance money upon its own policies as collateral security. The charges for the premiums are based upon exact mortality tables that have not excluded from their calculations death by suicide and murder.[9] Furthermore as a matter of practice it is the almost invariable custom of insurance companies to pay such losses, without contest, unless they have reason to suspect that policy was taken out with a view to the crime. For then the dispute is not as to a loss under a policy but whether a valid policy was ever issued.[10] But when there was no fraud in taking out the policy the fact that under its terms a loss has occurred is well shown by the decisions which allow the representative of the insured to recover on the policy.[11] Such a view met with approval in a recent North Carolina Case. *Anderson* v. *Life Insurance Co. of Va.*, 67 S. E. 53 (N. C.). In such a case the contract right of the insured against the company passes to the former's personal representative free from any equity in the beneficiary. Even those cases which say that, owing to the beneficiary's having had a direct right against the insurance company the representative's recovery must be in quasi-contract, effectually hold that there has been a loss, for the recovery is not the premiums paid but the face of the policy.[12]

TRANSFERS WITHIN THE RULE AGAINST CHAMPERTY AND MAINTENANCE. — Champerty and maintenance are usually found in transactions involving the giving of aid in a law suit. Such a case is *Van Gieson* v. *Magoon*, 20 Haw. 146, in which it was held, however, that an agreement by an attorney to defend a suit for a portion of the property in litigation is not illegal in Hawaii.[1]

The objection of champerty and maintenance is also frequently made to certain transfers of rights in property. Where a chattel is in the possession of an adverse claimant, the owner has nothing to transfer but a right of action or of recaption.[2] The assignment of this right is sometimes

[8] New York Mutual Life Insurance Co. *v.* Armstrong, 117 U. S. 591.

[9] See Lange *v.* Royal Highlanders, 110 N. W. 1110 (Neb.); ALEXANDER, THE LIFE INSURANCE COMPANY; 23 HARV. L. REV. 557.

[10] Prince of Wales, etc., Assn. *v.* Palmer, 25 Beav. 605; Conn. Mutual Life Insurance Co. *v.* Hillmon, 188 U. S. 208 (death, thirteen days after issue of policy); New York Mutual Life Insurance Co. *v.* Armstrong, *supra*, in which were spoken the words of Field, J., *supra*.

[11] Cleaver *v.* Mutual Reserve Fund Assn., *supra*; New York Life Insurance Co. *v.* Davis, *supra*; Supreme Lodge *v.* Menkhausen, 209 Ill. 277; Schonfield *v.* Turner, 75 Tex. 324.

[12] See 14 HARV. L. REV. 375.

[1] For a discussion of the law as to attorney's fees, see 18 HARV. L. REV. 222.

[2] Goodwyn *v.* Lloyd, 8 Port. (Ala.) 237; McGoon *v.* Ankeny, 11 Ill. 558. See 3